

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE**

**NEW SCHOOL UNIVERSITY**

**Employer**

**And**

**Case No. 2-RC-22697**

**ACADEMICS COME TOGETHER/UAW  
(ACT/UAW)**

**Petitioner**

*Catherine J. Trafton Esq.*, Counsel for the  
Union

*Ned. H. Bassen Esq., and Christine M.*

*Fitzgerald Esq.*, Counsel for the Employer

*Nancy Slahotka Esq.*, Counsel for the  
Regional Director

**Decision On Objections**

Raymond P. Green, Administrative Law Judge. I heard this case on March 31, April 1 and 2 and April 12 and 13, 2004.

The Petition was filed by the Union on March 21, 2002 and it sought to have an election in a unit of full-time and part-time faculty. At the time of filing, it is obvious that at least some of the full-time faculty supported the Union and were involved in its organizing efforts.

As the parties did not agree on the scope of an appropriate bargaining unit, the Regional Office conducted a lengthy hearing that lasted from April 8, 2003 to September 3, 2003. There were approximately 33 days of hearing. The parties filed Briefs on October 8, 2003 and the Petitioner asked that its requested unit be modified to exclude the full-time faculty, which was the position that the University had taken.<sup>1</sup> In this regard, without conceding that the full-time faculty members of this University were supervisory and/or managerial employees, the Union for purposes of obtaining an election, essentially acceded to the University's position, which was that this category of persons did not have the right to be represented under the National Labor Relations Act. That is, although the Union maintains that this class is entitled to representation under the Act, it did not press that issue in order to get to a vote in a unit of part-time and adjunct

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<sup>1</sup> There was testimony that the Employer's counsel asserted its hope that new Board members would overrule or modify the Yeshiva University decision, (*NLRB v. Yeshiva University*, 444 U.S. 672), and that the Union's representatives, fearing that he might be right, chose to abandon their efforts to represent the full-time faculty at this time.

faculty. As a consequence of the Union’s position as stated in its Brief, the Regional Director deemed that the Union was amending its petition to seek an election in a unit consisting of, inter alia, part-time faculty and part-time teaching staff but excluding all full-time and core faculty, as well as faculty serving as department chairs, associate chairs and program directors.<sup>2</sup>

On December 19, 2003, the Regional Director issued a Decision and Direction of Election. The Director ordered that an election be conducted by secret ballot but did not set a date certain. However, she did note that pursuant to Section 102.21(d) of the Board’s Statement of Procedure, “an election will normally be scheduled for a date or dates between the 25<sup>th</sup> and 30<sup>th</sup> day after the date of this Decision.” The Decision set forth the unit of employees as follows:

INCLUDED: All part-time faculty, part-time teaching staff and hourly faculty employed by the Employer.

EXCLUDED: All other employees, including full-time faculty, core-faculty, half-time faculty with multi-year appointments, salaried faculty, department chairs and associate chairs, program directors and part-time faculty teaching at the Jazz and Contemporary Music Program and in Ballston Spa, New York.

In describing eligibility, the Regional Director, at footnote 40, stated; “Eligible to vote are those in the unit who have received appointments to teach at least one course in at least two of the last three consecutive academic years, including the current academic year.”

On January 9, 2004, the Acting Regional Director, sent a letter to the parties regarding an election. Stating that the parties had failed to agree on whether the election should be conducted solely by manual balloting, mail balloting, or by a mixture of both, he notified that parties that an election would be conducted by mail ballot which was the position urged by the Petitioner.<sup>3</sup> He further directed that the ballots would be mailed on Friday, January 30, 2004 and that to be counted, the ballots had to be received by the Regional Office not later than the close of business on Friday, February 20, 2004.

The Employer appealed the Region’s decision to hold a mail ballot election.

On January 16, 2004, the Director issued an Order Clarifying the Decision and Director of Election in which she amended footnote 40 as follows: “Eligible to vote are those in the unit who have received appointments and teach at least one course in at least two of the last three consecutive academic years, including the current academic year.”<sup>4</sup>

By letter dated January 21, 2004, the Region sent Election Notices to be posted at the Employer’s premises. The dates of the election were to be from January 26, to January 30, 2004.

<sup>2</sup> The Union also agreed to exclude certain other faculty positions but their enumeration is not relevant here.

<sup>3</sup> As the letter is part of the record, I need not discuss the rationale for that decision.

<sup>4</sup> The modification here is simply to clarify that there might be people who received appointments to teach but who, in fact, did not teach for one reason or another. For example the class was cancelled because of insufficient enrollment.

Thereafter, the Board issued an Order, which overturned the Regional Director in part. The Board agreed with the Employer's contention that the election be conducted by a combination of manual balloting and mail balloting. In order to accomplish this change, the Board ordered that the election be postponed.

On February 4, 2004, the parties entered a stipulation regarding the eligibility formula and this was approved by the Regional Director. The change stated:

Eligible to vote are those in the unit who have received appointments and teach at least one course of three or more credit hours or *the equivalent* in at least two of the last three consecutive academic years, including the current academic year.

Thereafter, by Order dated March 26, 2004, the Regional Director, in accordance with this stipulation, issued an Order correcting the unit description to conform to the parties' agreement.

After discussions with the parties yielded no agreement as to the dates of an election, the Regional Director, on February 5, 2004, sent a letter to the parties. Essentially agreeing with the Employer, the Regional Director ordered that the mail ballots be sent out on February 13 and returned by February 26 and that the manual balloting take place on February 23, 24, 25 and 26, 2004.

I note that with respect to the manual voting, there were five polling places, all of which were on the University's property. The hours for the voting were from 8:30 a.m. to 11:00 p.m. at three locations, from 8:30 a.m. to 10:30 p.m. at one location and from 8:30 to 9:00 p.m. at the last location. Each side was allowed to designate non-supervisory observers who received standard written instructions before the polls were opened.

Although employees were encouraged to vote at the polls to which they were assigned, (their normal work locations), they were not required to do so. If they voted at another location, their votes would be challenged and placed into a separate envelope before being deposited in the ballot box. This was to insure that voters did not vote at more than one location. (If employees showed up to their designated polling place, the normal procedure would be that they would identify themselves and if their names were on the eligibly list for that location, they would case a ballot by marking it in a voting booth and depositing it in a ballot box). Similarly, employees who received mail ballots were not foreclosed from going to a polling station and manually casting a vote. In the same manner that person would be given a challenged envelope to segregate his or her ballot so that it could be ascertained, before the count, that he or she did not also mail in a ballot. The procedure was that before the votes were counted, the challenged ballots were examined and if a person cast only a single ballot, the challenged ballot would be removed from the envelope and mixed in with the other unchallenged votes. (Every effort is made to ensure the secrecy of the ballots).

A second set of Election Notices was sent to the Employer on February 13 and these were posted from February 16 to February 26. Also on February 13, the mail ballots were sent out to the group that was designated to receive them. The Notices, among other things, set out the time and place of the election, the description of the voting unit, and the newly amended eligibility requirement that had been stipulated to by the parties.

The votes were counted on February 27, 2004 and the Tally of Ballots showed that of about 1702 eligible voters, 530 cast ballots in favor of the Union, 466 cast votes against, 87 cast unresolved challenged ballots and 23 cast void ballots. Subsequently, the parties agreed that 31 of the challenged voters were ineligible and a revised Tally was issued on March 10. Thus, with the with the elimination of 31 challenged voters, the number of challenged ballots was not determinative of the outcome of the election and the Union was the winner.

On March 5, 2004, the Employer filed Objections to the Election and the Regional Director without further ado, issued a Notice of Hearing on the same date. The Order required that a hearing be conducted before an Administrative Law Judge.

Based on the entire record, including my observations of the demeanor of the witnesses and after considering the arguments of counsel, I hereby make the following <sup>5</sup>

### **Findings and Conclusions**

#### **Objection 1.**

This essentially reiterates the procedural history of the representation case, (as described above), and asserts that substantial confusion was created because (a) the Regional Director issued her Decision and Direction of Election during intercession; (b) the Director's original decision incorrectly stated the proper eligibility requirements, (c) that initially the Director scheduled an election by mail ballot to commence on February 2, 2004; (d) that when the Employer won its appeal, the Board acceded to its request to postpone the election and have it conducted by a mixed mail-ballot and manual election; (e) that the eligibility rules were changed as a result of a stipulation of the parties; (f) two sets of election notices were posted, the first (for a mail ballot election) and the second for the mixed mail ballot, manual election; (g) that as part of the manual election, voters were notified that although their primary voting locations were where they were employed, they could vote at any of the five designated polling stations; and (h) that the Region decided to count and not impound the ballots.

In my opinion, this Objection has lacks merit as the contentions here do not allege any conduct either by the Petitioner or by agents of the Regional Office, which could be grounds for setting aside the election.

The procedural history of the underlying case was the result of a complicated and lengthy hearing that lasted for about 33 days over a five-month period of time. The Regional Director issued her decision when it was ready for publication and she was under no obligation to delay its issuance because teachers may have been away on vacation.

The Employer's contention that voters were confused because of the Regional Director's actions is likewise without merit. It is true that the initial mail ballot election was overruled by the Board and that the original date of the election was therefore changed, (at the Employer's request), in order to have a mixed mail and manual ballot. I find that it is unlikely that a group of

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<sup>5</sup> I note that there were no material disputed issues of fact.

college teachers would be unable to figure out the proper voting places and proper voting times. In this respect, the second notices were posted from January 13, and were sent to the mail ballot voters at the same time. Moreover, each side communicated with voters in relation to the upcoming election. (I note that in addition to the normal channels of communication, both the Employer and the Union established web sites where voters could go for information).

Similarly, the Employer makes much of the fact that the eligibility requirements were changed by the Regional Director. But even so, the ultimate eligibility rule was the result of a stipulation between the Union and the Employer dated February 4, 2004, and the change would have affected few eligible voters at most. In the original decision, people were eligible if they received appointments to teach a certain number of courses over a period of time, whereas the two subsequent clarifications made it clear that a part-time faculty member had to have actually taught during the relevant period of time or done the equivalent. To this extent, the modified eligibility rules might conceivably have eliminated an *indeterminate* number of faculty members who had received appointments, but had not actually taught the requisite number of classes for whatever reason. Moreover, if an employee was in doubt, he or she could have cast a challenged ballot.

Based on the above, it is my conclusion that this Objection has no merit and should be dismissed.

### **Objection 2.**

The Employer asserts that the Regional Director “repeatedly has attempted to ram through an election rather than take efforts to maximize voting and that the Union in campaign material portrayed the University “as attempting to disenfranchise voters.” This objection also asserts that because of the confusion created by the Regional Director’s actions, (presumably described in Objection 1), about 700 eligible voters or 41% did not vote in the election.

The allegation that the Regional Director attempted to “ram through the election,” is incorrect on its face and is overruled.

The University also contends that in various campaign materials, the Union made statement misleadingly portraying the University as trying to disenfranchise voters. In this regard, the Employer put into evidence, (Employer Exhibit 21), a group of documents consisting of letters, e-mails etc.

In these communications, the Union was trying to keep employees informed of the campaign and the NLRB proceedings. It is true that the Union stated that the NLRB hearings were instigated by the Kerry administration; that this was a cause for delay and that the University was trying to have certain faculty members excluded from the unit. But this was of course true. The University’s position was that the Union’s attempt to include full-time faculty was contrary to the Supreme Court’s decision in *Yeshiva University* and that the only way to resolve these questions was to have a hearing. The Union said that the election was being delayed because the University objected to a mail ballot election. But this too was true. The University did object to a mail ballot election and when the Board agreed with the University’s position, the election was delayed for a short period of time.

It was the University's absolute right to refuse to enter into a stipulated election agreement and to litigate, in a representation hearing, the scope of the unit and the eligibility standards for voting. And certainly, the University had the right to take exceptions to the Regional Director's decision to hold the election solely by a mail ballot. But it is also the right of the Union to comment on these actions and to point out that by invoking its rights, there necessarily came about a lengthening of the time that it was going to take from the filing of the petition to the holding of the election. There was nothing in the Union communications that were not substantially accurate in terms of the described facts. To the extent the University objects to the "spin" put on those facts, it had ample opportunity to respond and present its position to the voters before the election.

To the extent that the Employer raises the fact that a sizeable number of people did not vote, the evidence shows that the pool of eligible voters, via the Board's notices and the communications from the Union and the Employer, were advised of their right to vote and were urged to do so by both sides. If people ultimately choose, for whatever reason, not to vote, that is their own concern. (I note that the percentage of employees who voted in this election was somewhat higher than the percentage of people that normally vote in our political elections). See *Lemco Construction*, 283 NLRB 459 (1987) and *Glass Depot*, 318 NLRB 766 (1995), for the proposition that unless caused by an extraordinary event, the Board will not set aside an election where it is contended that a representative complement has not voted. Thus, in *Lemco*, the Board stated:

The fundamental purpose of a Board election is to provide employees with a meaningful opportunity to express their sentiments concerning representation for the purpose of collective bargaining. The law does not compel any employee to vote, and the law should not permit that right, to refrain from voting, to defeat an otherwise valid election. As the Board observed in *Versail Mfg.*, 212 NLRB 592, 593 (1974), "[t]here must be some degree of finality to the results of an election, and there are strong policy considerations favoring prompt completion of representation proceedings." In political elections, voters who absent themselves from the polls are presumed to assent to the will of the majority of those voting. Similarly, when a Board election is met with indifference, it must be assumed that the majority of the eligible employees did not wish to participate in the selection of a bargaining representative and are content to be bound by the results obtained without their participation. Only if it can be shown by objective evidence that eligible employees were not afforded an "adequate opportunity to participate in the balloting" will the Board decline to issue a certification and direct a second election.

In light of the above, it is my conclusion that this Objection lacks merit and should be dismissed.

### **Objection 3.**

This alleges that at the election, Region 2 agents discouraged faculty who appeared to vote at a wrong location from voting a challenged ballot; and instead, in an uncooperative manner, encouraged them to vote at their assigned voting locations. It is asserted that this could have resulted in the effected voters being disenfranchised.

The arrangement that was made was to have employees vote at the location where they normally worked. There were five voting places in addition to the mail ballot votes. Employees were urged to vote at their own working locations, no doubt because that would be most convenient for them. In addition, the voters had the additional option of voting at a time of their convenience as they could choose one of four days to cast their ballots. In the event that an employee chose to vote at a different location, he or she could choose to do so, but would have his or her ballot challenged. This meant that the ballot would be put into a sealed envelope before being deposited in the ballot box and then before the count, and after determining that the individual voted only once, having the envelope opened so that the ballot could be mixed in with the unchallenged ballots for counting.

The Employer's witnesses testified that on some occasions, employees who came to vote at a location other than their assigned location, were told by the Board agents that it would be preferable if they voted where they were supposed to vote. But the evidence also shows that in all cases, such voters were told that if they chose to cast their ballots at a location other than the one assigned, they could do so, but that it would be a challenged ballot.

Based on the above, it is my conclusion that this Objection has no merit and should be dismissed.<sup>6</sup>

#### **Objection 4.**

This alleges that the Board agents conducting the election did not ask voters for any form of identification before voting.

There is no Board rule or requirement that voters, when they come to register at a polling place, be required to show identification. It is assumed that when voting takes place at the voter's place of employment and where each side is entitled to appoint observers to assist the Board agents in conducting the election, that each side will choose people who are familiar with the voters at the location in question. It also is assumed that voters will honestly identify themselves.

In this case, neither the Union nor the Employer, before the commencement of the election, raised any issue regarding voter identification. Had either side done so, I suspect that the Region would have considered such a request and might very well have agreed. But there is no evidence that the Employer, over the four-day period when this election was being conducted, ever asked that the Regional office to impose any identification requirement.

In support of this Objection, the Employer cites *Avondale Industries Inc. v. NLRB*, 180 F.3d 633 (5<sup>th</sup> Cir. 1999). Apart from the fact that the Board rejected the Employer's Objections in that case, it is my opinion, that the facts are distinguishable.

In *Avondale*, the voting unit was more than twice the size of the present unit. And unlike the present case, it was anticipated by the NLRB office conducting the election, that there would

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<sup>6</sup> There was no evidence that anyone was disenfranchised because of this procedure.

be hundreds of individuals who would appear at the election and who would be challenged because they were not listed on the Employer supplied *Excelsior* list of eligible voters. Moreover, although the Court noted that voter self-identification is the norm for Board elections, it also noted that in this particular case, the election contest was “bitter and hostile” and “sure to provoke suspicion in whichever party lost.” The Court noted that the election was close and that the Union achieved a margin of only 130 votes out of nearly 4000 votes cast. Finally, the Court noted that the Employer produced specific evidence of potential voter fraud, “stemming directly from the failed identification procedures” and which raised “serious questions concerning the possible occurrence of vote fraud.”

In light of the above, I conclude that this Objection is without merit and should be dismissed.<sup>7</sup>

#### Objection 5.

This alleges that Board agents at the 2 West 13<sup>th</sup> street polling place, made it known that they were taking the ballot boxes home at the end of the evening.

The Employer produced no evidence regarding this allegation. As such, and because the allegation would not be objectionable conduct anyway, this Objection is deemed to be without merit and is dismissed.

#### Objection 6.

This alleges that at 8:15 p.m., on Monday February 23, 2004, the front door to the polling place located at 65 West 11<sup>th</sup> street was locked and remained locked for the remainder of that evening.

There was testimony that this entrance is normally closed at around 6 p.m. The testimony was that on the first day of the election, this entrance was closed at around 8 p.m. because the security person normally assigned to this post, went off duty. However, as this polling place was accessible by another well known entrance on 12<sup>th</sup> street, people who wanted to vote, could come in through that entrance. On the remaining days of the election, the door to 65 West 11<sup>th</sup> street was kept open until the polls closed. There was no evidence that any voters failed to vote at this location because of the door being closed on February 23. I might add that it is somewhat peculiar for the Employer to be objecting about this, inasmuch as all of the buildings where the voting took place were owned and controlled by the Employer.<sup>8</sup>

<sup>7</sup> The Employer presented no evidence that anyone voted in another’s place.

<sup>8</sup> In *Whatcom Security Agency*, 258 NLRB 985 (1981), the Board set aside an election but under very different circumstances. In that case, there were two polling places and a third party closed the doors to one building about 50 minutes prior to the end of the afternoon polling time. Of approximately 70 eligible voters, there were 24 people who did not vote, including 14 who were scheduled to cast their ballots at the locked building. The Board stated, “where the irregularity concerns an essential condition of an election, and calls into question a determinative number of ballots to affect the outcome, to maintain the Board’s high standards the election must be set aside. Thus, under all the circumstances, and particularly since the large number of nonvoters could have affected the election results, we find that the deviation from our normal election procedures created doubt and uncertainty as to the results of the instant election....”

In view of the foregoing, I conclude that this Objection has no merit and should be dismissed.

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### **Objection 7**

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This alleges that on Tuesday, February 24, 2004 at about 10:45 p.m. a maintenance employee locked the doors to the West 13<sup>th</sup> street building, 15 minutes before the closing time at that polling location. In fact there are two entrances to this building.

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The testimony was that at about 6:00 p.m. a maintenance employee of the University told the Board agent and observers that he was going to close the building at about 10:45 p.m. The evidence shows that the Board agent told this unidentified person that the polls would remain open until 11:00 p.m. and that they were not leaving until that time. Moreover, the evidence shows that after the maintenance department was ultimately contacted through efforts of the Employer's counsel, at least one of the entrances to the building remained open and at 11:00 p.m., the Union's agent came up to the fourth floor where the poll was being closed for the night. There was no competent evidence to establish that on this day either of the entrances to the building was actually locked before the polls closed or that any person who arrived and wanted to vote was unable to do so.<sup>9</sup>

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In light of the above, I conclude that this Objection has no merit and should be dismissed.

### **Objection 8.**

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This alleges that when the polls opened on February 23, 2004 and continuing to at least noon, (and perhaps the entire day), union representatives wearing "Vote Yes" buttons stationed themselves in an office overlooking the inner courtyard of the 65 West 11<sup>th</sup> street polling location and refused to leave. It is asserted that people coming to vote at this polling site, would have walked past and under them as they entered the building where the balloting was being conducted.

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The evidence shows that on the morning of February 23, 2004, at one location, two union officials received permission from a faculty member to use her office at 65 West 11<sup>th</sup> street. This office was on the second floor of the building and was immediately above the Cyber Café where the election was being held. As the windows of the office are large, it is possible for a person walking across the courtyard on her way to the voting area, to see the union officials if they were sitting or standing in the office. The Employer's witnesses testified that the union representatives were wearing "Vote Yes" buttons. These buttons, unless really big, would not be particularly readable to a person passing under the office window on the way to the election.

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<sup>9</sup> Ms. Fitzgerald testified that at around 6 p.m. she listened to a voice mail from a Board agent who said that some maintenance people had said that they would have to leave around 10:45 p.m. and that she followed up on this by contacting the University to make sure that the polls would remain open until 11:00 p.m. She also testified that on the following morning, she spoke to a Board agent who said that he was told by someone from the university that the maintenance people had told him that the doors had been locked at around 10:45 even though the Board people could remain in the building until 11:00 p.m. This is double hearsay, and the Employer produced no other evidence that the doors to the building were ever locked.

When asked to leave the office, the union representatives refused and challenged the Employer to call the police if they insisted that they leave.

5 There is no evidence that these union officials talked to prospective voters while they were stationed in the second floor office or, apart from wearing the union buttons, engaged in any form of electioneering on the days of the election.

10 The Employer cites *Nathan Katz Realty, LLC. v. NLRB*, 251 F.3d 981 (D.C. Cir., 2001). In that case, the issue was whether the Regional Director should have held a hearing where the Employer alleged that two union agents parked their cars within 20 feet of the side door leading to the voting place and “motioned, gestured and honked at the employees as they passed the car.” Unlike the present, case the Employer alleged that the union agents placed themselves within a 25 foot “no electioneering zone” that was established by the Board agent outside the entrance to the building. While not concluding that this conduct would necessarily be grounds for setting 15 aside the election, the Court remanded the case for a hearing, stating that the union agent’s conduct occurred in a no-electioneering zone and that their presence and actions were contrary to the instructions of the Board agent. Neither of these conditions are involved in the instant case.

20 In my opinion, the mere fact that these two union officials used the second floor office and may have been visible to some voters who passed under the window on their way to the polling area is insufficient grounds to set aside the election. *Golden Years Rest Home*, 289 NLRB 1106 (1988); *Boston Insulated Wire Co.*, 259 NLRB 1118 (1982); *Harold W. Moore & Son*, 173 NLRB 1258 (1968); *Marvil International Security Service*, 173 NLRB 1260 (1968). 25 See also *Faulhaber Co.*, 191 NLRB 326 (1971).

### Objection 9.

30 This alleges that at the 2 West 13<sup>th</sup> street polling place, there was a video camera in the voting room and that this intimidated potential voters.

35 The Employer’s witness testified that the room used at this location had previously been set up to display an art exhibit that involved video monitors and a video camera. When the parties gathered before the election, no one expressed any complaint about the display or the camera, which was not on. And when, during the day, the Employer’s observer started to feel that having this camera in the room was not appropriate, she complained to her superiors, but not to the Board agent conducting the election. There was evidence that a number of voters 40 expressed concern about the camera and were told that the camera was not in operation. The fact is that this room was on company property and therefore under the control of the employer. Neither party complained to the Region’s representatives about this situation at any time during the four days that the election was conducted. If they had, I suspect that the camera would have 45 been removed or covered.

In light of the above, I conclude that this Objection lacks merit and should be dismissed.

### Objection 10.

This alleges that at the polling place at 2 West 13<sup>th</sup> street, a union observer was observed to pass a piece of paper to an eligible voter before that person cast her ballot.

The Employer's witness testified that on one occasion during the election, the Union observer was having a discussion with a voter about some type of exhibition and that at one point the observer passed a paper to the voter. The Employer's witness couldn't say what was on the paper and couldn't say that the observer engaged in any electioneering. The Union observer testified that after a voter had cast her ballot, the voter asked about a lecture and that she, (the observer), probably gave her an e-mail address. This transaction does not amount to objectionable conduct. *Sawyer Lumber Co.*, 326 NLRB No. 137 (1998) and *Dubovsky & Sons*, 324 NLRB No. 164 (1997).

The Employer's witness also testified that during the election she heard the union observer complaining about how she had been treated by her Department chair and make statements that the female faculty was underpaid. The evidence indicates that these comments were made during a brief time, at a single voting location, by a single union observer when there may or may not have been one or two voters present. In my opinion, this conduct cannot even be construed as electioneering. Moreover, even if these isolated comments could conceivably be characterized as electioneering, they were, in the context of this election, de minimus, and should not be grounds for setting the election aside. *Milchem Inc.*, 170 NLRB 363, 363 (1968); *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118-19, (1982) enf. 703 F.2d 876, 88 (5<sup>th</sup> Cir. 1983); *Bonanza Aluminium Co.*, 300 NLRB 584 (1990); *Crestwood Hospitals*, 316 NLRB 1057 (1995); *Angelica Healthcare v. NLRB*, 815 F.2d 225, 228-254 (2<sup>nd</sup> Cir. 1983).

In light of the above, I therefore conclude that this Objection has no merit and should be dismissed.

### **Objection 11.**

This alleges that at various times during the morning of February 23, 2003, a student associated with a student organization, after conferring with Union representatives, displayed a large banner in the inner courtyard of 65 West 11<sup>th</sup> street and in the connected building on West 12<sup>th</sup> street. The banner read: "We support: The Union; Our Professors, Our Education." The Employer asserts that this student was a member of the Student Labor Union Group or SLUG.

Apart from seeing this student talking to two union representatives on the morning of February 23, 2004, after which he attempted to hang the banner from the second floor, the Employer produced no evidence that he was an agent or representative of the Union. At most, he was a sympathetic student who, with other students, evinced their support for the union's campaign. The fact that this student was seen talking to union representatives immediately before displaying the banner, is not proof that he was a union agent. As such we are talking about third party conduct.<sup>10</sup>

The evidence shows that for a couple of hours on the morning of Monday, February 23,

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<sup>10</sup> The question then is whether this activity, even if attributable to third-parties, was "so aggravated as to create a general atmosphere of fear or reprisal rendering free choice in an election impossible." *Electra Food Machinery, Inc.*, 279 NLRB 279; *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984).

2003, this student displayed a large yellow banner with the words described above, in the inner courtyard which is outside the polling room located at 65 West 11<sup>th</sup> street. He also displayed the banner for maybe an hour during the same afternoon in the lobby of West 12<sup>th</sup> street, which is where voters could have entered before crossing the courtyard to enter the 11<sup>th</sup> street building and the polling room. Ultimately when asked by the University's security person, he agreed to withdraw the banner. This banner was not displayed again.

The banner itself is somewhat innocuous and was displayed for a relatively short period of time. At most, it could be considered electioneering and it cannot, by any stretch of the imagination, be described as conduct that could produce an atmosphere of confusion and fear of reprisal among the potential voters.

The area where the banner was displayed was not within the sight of voters once they entered into the actual voting room and there is no contention that either the courtyard area, or the 12<sup>th</sup> street lobby were designated as "no-electioneering" zones. <sup>11</sup>

Based on the above, it is my conclusion that this Objection has no merit and should be dismissed.

### **Objection 12.**

This alleges that after the mail ballots were sent out, union representatives made threatening and intimidating phone calls to faculty. The Employer produced no evidence to support this allegation and therefore it should be dismissed.

### **Objection 13.**

This alleges that from the beginning of the campaign and continuing until the election, faculty with supervisory and/or managerial duties, without the University's consent, actively campaigned for the Union among employees that they supervised. <sup>12</sup>

The only evidence to support this Objection was a number of union campaign documents, which were "signed" by many employees including a small number of people who were either full time faculty or core faculty. In addition, one was a Chair, one was an Associate Chair, and one was the Director of Undergraduate Foreign Languages. <sup>13</sup>

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<sup>11</sup> The room where the election was held is called the Cyber Café and the windows were papered over so that no one could see inside or outside of the room.

<sup>12</sup> Consistent with Board law, which limits objections to conduct occurring from the date of the petition to the date of the election, I limited the Employer's ability to produce evidence accordingly. In other words I told Counsel that I would not hear, except if necessary for background purposes, evidence of any conduct that took place before the filing of the petition or after the election was held. By the same token, the fact that a managerial or supervisory faculty member may have originally been on the organizing committee is not sufficient unless the Employer can establish that his or her actions took place after the filing of the Petition and that such actions created the improper impression among voters, that such person was acting on behalf of management or that he created a fear of reprisal.

<sup>13</sup> People did not actually sign these documents. Their names were printed after they had indicated to the Union that they were willing to have their names used for the documents.

Assuming that a small number of the individuals who lent their names to union communications either were supervisory or managerial employees, that is hardly sufficient grounds for overturning this election. Apart from adding their names, the Employer produced no evidence showing that during the critical period, (between the time that the petition was filed and the end of the election), <sup>14</sup> that any supervisors actively campaigned for the Union or in any way, coerced employees into voting for union representation. Moreover, although the University asserts in its Brief that it maintained a “neutral” position, the evidence shows that the University via letters, oral communications, and web communications, made it clear, in a noncoercive way, that it preferred to maintain its non-union status. <sup>15</sup>

In *Sutter Roseville Medical Center*, 324 NLRB 218 (1997), the Board rejected an employer’s Objections and stated:

The prounion activities of statutory supervisors may constitute objectionable conduct warranting setting aside an election in two situations; (1) when the employer takes no stand contrary to the supervisors’ prounion conduct, thus leading the employees to believe that the employer favors the union; or (2) when the supervisors’ prounion conduct coerces employees into supporting the union out of fear of retaliation by, or rewards from, the supervisors.

In my opinion, during the critical period, voters had no objective reason to believe that the University favored unionization or that its managers or supervisors were acting on its behalf to support the Union. *U.S. Family Care San Bernadino*, 313 NLRB 1176 (1994); *Cal-Western Transport*, 283 NLRB 453 (1987). See also *Kleen-Test Products*, 302 NLRB 464 (1991). I also conclude that there is no evidence to suggest that employees were induced to support the Union because of actions by supervisors, which caused employees to fear reprisal from such supervisors.

In view of the above, I conclude that this Objection has no merit and should be dismissed.

#### **Objection 14.**

This is merely a catchall allegation, asserting that the foregoing allegations undermined

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<sup>14</sup> *Ideal Electric & Mfg Co.*, 134 NLRB 1275 (1961).

<sup>15</sup> For example, in a January 30, 2004 letter to faculty, Dean Shapiro wrote; “I have serious doubts about whether the Auto Workers Union has sufficient academic experience to adequately represent the needs and goals of faculty.” She also wrote; “I also have serious concerns about the union’s potential effects on the curriculum in an institution that is almost entirely tuition-driven. Will the number of courses we can offer decline? Will class size increase? How would the union affect the ways you work with Chairs on the curriculum?” Similarly, on February 18, 2004, President Kerry wrote: “As president of this complex institution, my position is this; shared governance is better than a union to improve academic quality and ensure the entrepreneurial spirit that a private college needs in today’s competitive environment.”

the holding of a fair election. Since it does not allege any specific conduct, it should be dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

**ORDER**

The representation cases in 2-RC-22697, is be remanded to the Regional Director of Region 2, for the purpose of issuing the appropriate Certification. 16

Dated, Washington, D.C.

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Raymond P. Green  
Administrative Law Judge

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<sup>16</sup> Any party may, within fourteen (14) days from the date of issuance of this recommended Decision, file with the Board in Washington, DC, an original and eight (8) copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director of Region 2. If no exceptions are filed, the Board will adopt the recommendations set forth herein.